STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellee

-vs-

DARRELL JOHN WILDER

Defendant-Appellant

_____/

Supreme Court No. 154814

Court of Appeals No. 327491

Lower Court No. 14-004600-01 FH

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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions, Statutes, Court Rules

STATEMENT OF QUESTIONS PRESENTED

I. **DID THE TRIAL COURT ERR BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE MRS. WILDER ABOUT MR. WILDER'S PRIOR FIREARMS RELATED CONVICTIONS?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

II. **DID THE PROSECUTOR IMPROPERLY RAISE A COLLATERAL ISSUE TO ADMIT EVIDENCE OF THE DEFENDANT'S PRIOR FELONIES THROUGH IMPEACHMENT?**

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

III. **WERE THE COURT AND PROSECUTORIAL ERRORS HARMLESS?**

Court of Appeals answers, "No".

Defendant-Appellant answers, "Yes".

STATEMENT OF FACTS

On May 16, 2014 at approximately 4:20 pm two police officers located a weapon in the trunk of a car parked in a vacant lot in Detroit. T1, 157. The officers arrested Mr. Wilder (T1, 156, 162). Mr. Wilder was one of approximately six black males at the scene (T1, 149-150). The officers claimed they saw, from a distance of about 100 feet (T1, 149) an oversized cylinder protruding from Mr. Wilder's right front pocket (T1, 151, 205-206) and that he placed the gun in the trunk of the car (T1, 153, 207).

The defense countered that it was not Mr. Wilder who placed the weapon in the trunk. To buttress this defense, counsel cross-examined the officers about details in their report that were admitted to be inaccurate (T1, 225, 227) and she established through testimony that the officers saw the gun in the right pocket of the person who had it (T1, 151, 205) and that the person placed the gun into the trunk with his right hand (T1, 207). Mr. Wilder's wife established that he is left handed. T2, 75-76. Two people at the scene with Mr. Wilder also testified and said he did not have a weapon nor did he place anything in or have the keys to the trunk. T2, 22, 107.

Over defense counsel objection, the trial court allowed the prosecution to question Mrs. Wilder about her husband's two prior convictions for possessing a weapon. T2, 82-83. The trial court allowed this testimony after the prosecution asked Mrs. Wilder on cross-examination whether she knew "of him to carry guns?" T2, 81. The prosecution then proceeded to ask Mrs. Wilder about Mr. Wilder's 2007 and 2010 weapons convictions. T2, 84-87. Defense counsel moved for a mistrial following this testimony and the trial court denied the motion. T2, 94.

Mr. Wilder appealed by right, arguing, among other issues, that his prior convictions for gun possession were admitted in error. *People v Wilder*, unpublished opinion of the Court of Appeals, entered September 27, 2016 (Docket No. 327491). The Court of Appeals ruled that Mr.

Wilder's priors were not offered as character evidence so MRE 404(b) was not triggered. And, because Mr. Wilder himself was not testifying and these were not Mrs. Wilder's priors, MRE 609 was not applicable. Because MRE 611(c) allows cross-examination on any matter including impeachment, the priors were admissible to impeach Mrs. Wilder. *Wilder*, unpub op at 4. Additionally, Mrs. Wilder's "knowledge of her husband's history regarding gun ownership and possession was clearly relevant and closely bore on defendant's guilt or innocence[,]" and so it was not collateral. *Wilder*, unpub op at 5.

On May 26, 2017, this Court granted argument on whether to grant the application or take other action. *People v Wilder*, 894 NW2d 611 (2017). This court directed the parties to address (1) whether the trial court erred by allowing the prosecutor to cross-examine the defendant's wife about his prior firearms-related convictions; (2) whether the prosecutor improperly raised a collateral issue to admit evidence of the defendant's prior felonies through impeachment, compare *People v Stanaway*, 445 Mich 643 (1994), with *People v Kilbourn*, 454 Mich 677 (1997); see also *People v Vasher*, 449 Mich 494 (1995); and (3) whether any error was harmless. *Id*.

I. THE TRIAL COURT ERRED BY ALLOWING THE PROSECUTOR TO CROSS-EXAMINE MRS. WILDER ABOUT MR. WILDER'S PRIOR FIREARMS RELATED CONVICTIONS.

Issue Preservation and Standard of Review:

Trial counsel preserved this issue by objecting to the admission of the prior convictions and by moving for a mistrial. T2, 82, 93.

The decision whether to admit evidence is within the trial court's discretion; this Court only reverses such decisions where there is an abuse of discretion. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607, 609-10 (1999). The "abuse of discretion" standard also applies to a trial court's decision whether to grant a mistrial. *People v Dennis*, 464 Mich 567, 572; 628 NW2d 502 (2001). "A trial court necessarily abuses its discretion when it makes an error of law." *People v Denson*, ____ Mich ____, _____ NW2d ____ (2017) (slip op, 6) (citing *Lukity*, 460 Mich at 488).

Argument:

The trial court erred by allowing the prosecutor to cross-examine Mrs. Wilder about Mr. Wilder's prior felony-firearm convictions. In ruling that the prosecutor could bring in Mr. Wilder's prior convictions, the trial court chided defense counsel that "that's what happens when you put witnesses on and open the door." T2, 82.

The trial court found that defense counsel "open[ed] the door" by asking "if she's ever seen [Mr. Wilder] with a gun, if there were any guns in the house, if he owned any weapons, and if he had a gun that day…and you talked about the length of their relationship." T2, 82-83. However, the trial court mischaracterized defense counsel's line of questioning in so ruling.

Defense counsel did not "open the door" to the prosecutor's line of questioning. A party opens the door to otherwise inadmissible evidence by itself presenting inadmissible evidence that tends to create a misimpression or to mislead the fact-finder. *Grist v Upjohn Co*, 16 Mich App 452, 483 (1969). The rule of "curative admissibility" permits the opposing party, subject to the judge's discretion, to point to the otherwise inadmissible evidence as a way of placing the first party's potentially misleading evidence in its proper context and thereby rebutting any false impression. 1 Wigmore, Evidence §15, pp 731-51 (Tillers Revision 1983); see *Grist*, 16 Mich App at 481, 483; *United States v Whitworth*, 856 F2d 1268, 1285 (CA 9, 1988).

Defense counsel's questions were narrow in scope. Defense counsel began this line of questioning by asking "*And when you see your husband leave the house*, did you see him with a gun?" T2, 75 (emphasis added). This initial question set the relevant time frame for defense counsel's line of questioning: at or around May 16, 2014, the date of the offense. Defense counsel went on to ask the following additional questions: (1) "To your knowledge, do[es] he own a gun?"; (2) "Do you have any weapons in your house?"; (3) "And to your knowledge, does Mr. Wilder wear corduroys?"; (4) "And, your husband, do you know whether he's left-handed or right-handed?...How do you know?" T2, 75-76. At no point did defense counsel broaden that relevant time frame, as the prosecutor did later, to ask if Mrs. Wilder has "ever" known Mr. Wilder to own a gun or carry guns.

The length of Mrs. Wilder's relationship with Mr. Wilder was invoked in Mrs. Wilder's response to how she knows whether Mr. Wilder is right or left-handed. Mrs. Wilder replied that he is left-handed, and she knows this because "I've been with him for sixteen years." T2, 76. Mrs. Wilder never responded in that fashion when asked about Mr. Wilder's possession of weapons.

Mrs. Wilder served only as a fact witness. Mrs. Wilder never testified on direct examination as to Mr. Wilder's general character for not carrying a weapon. She testified about Mr. Wilder's actions before he left the house on the day of his arrest, the clothing he wore, and his left-handedness, facts that were relevant responses to police testimony. T2, 72, 75 (responding to police testimony at T1, 204, 207, 221). Additionally, Mrs. Wilder testified that Mr. Wilder did not carry a gun on the day in question "when he left the house" and that there were not weapons in the home she shared with Mr. Wilder. T2, 75.

This was not a case where, on direct examination, the defendant introduced evidence that placed his character in issue. *Cf. People v Vasher*, 449 Mich 494, 502-503; 537 NW2d 168 (1995) (where on direct examination, defendant, accused of criminal sexual conduct against his grandchild and two other young girls, stated he had "a close, grandfatherly, loving relationship with the girls and that this precluded him from ever harming them."). Indeed, the trial court seemed to acknowledge that it may have been the prosecution, and not the defense, that brought out evidence of defendant's character:

> *The Court*: …At some point, I don't remember if it was you, Ms. James, or you, Ms. Stanford, who asked if she ever seen the Defendant carry guns or ever knew him to carry guns but she said "no," and once she says that the veracity of her testimony becomes [sic] in question…

T2, 95.

It was not until cross-examination that the prosecution inquired about Mr. Wilder's character. And, initially, the scope of the questioning was still narrowly focused on the time at or around May 16, 2014:

> *Prosecutor*: Now, you were asked whether or not Mr. Wilder had a weapon on him that day?

> *Witness*: Yes.
>
> *Prosecutor*: Okay. You don't know where he went? You didn't see where he went after he left your apartment on the eastside of Detroit, did you?
>
> *Witness*: No.
>
> *Prosecutor*: Do you know of Mr. Wilder to carry weapons?
>
> *Witness*: No.
>
> *Prosecutor*: Do you know of him to carry guns?
>
> *Witness*: No.

T2, 81.

Only then did the prosecutor ask a broader question: "You've been with him for nine years and you don't know of him to carry guns?" T2, 81. Mrs. Wilder responded, "no."

Therefore, it was inaccurate when the trial court and the prosecutor stated that defense counsel asked if Mrs. Wilder has "ever" seen Mr. Wilder with a gun. T2, 82. The trial court was also inaccurate when it said that defense counsel "talked about the length of their relationship." T2, 83. It was the final question posed by the prosecutor above that combined the two elements the trial court erroneously associated with defense counsel: asking about gun possession over the entire scope of the relationship.

Defense counsel did not "open the door" to the prosecutor's broad line of questioning. Therefore, it was error for the trial court to allow the prosecutor to cross-examine Mrs. Wilder based on Mr. Wilder's priors.

Contrary to the Court of Appeals opinion, *Wilder*, unpub op at 4, citing "impeachment" as the rationale for bringing in other acts evidence against a defendant does not make the evidence non-character and does not void the requirements for admitting other acts evidence provided by the Rules of Evidence and Court. The four-prong test in *VanderVliet* clearly spells

out the inadmissibility of Mr. Wilder's priors under MRE 402, 403, and 404(b). *People v VanderVliet*, 444 Mich 52, 87; 508 NW2d 114, 132 (1993), amended 445 Mich 1205; 520 NW2d 338 (1994). These priors were also inadmissible under MRE 609, the only other rule of evidence that directly addresses prior convictions.

The prosecutor's strategy, to bring in Mr. Wilder's priors, that were identical to his charged offenses, by way of cross-examination of his wife, was the exact gamesmanship this Court was concerned about in *VanderVliet*. *VanderVliet*, 444 Mich at 90-91 ("The prosecutor should not be allowed to introduce other acts evidence only because it is technically relevant…waiting to determine the admissibility of other acts evidence relevant to an element only technically at issue, the trial court is able to forestall gamesmanship by the parties and insure the admission of evidence that possesses significant probative value."). This is precisely because of how closely the exclusion of other acts evidence bears upon "the central precept of our system of criminal justice, the presumption of innocence. This rule reflects the fear that a jury will convict a defendant on the basis of his or her allegedly bad character rather than he or she is guilty beyond a reasonable doubt of the crimes charged." *Denson* ____ Mich _____, slip op, 9-10. Put simply, there is no way to explain how Mr. Wilder's priors are relevant to Mrs. Wilder's credibility without relying on the propensity inference. *Id*., at 14.

Impeachment alone is not enough to overcome the great prejudicial impact of other acts evidence, particularly in this case where it is not clear that the introduction of Mr. Wilder's prior convictions actually impeached Mrs. Wilder's testimony on cross-examination.

On cross, Mrs. Wilder testified that she did not know of Mr. Wilder to carry guns. Knowing of Mr. Wilder's prior convictions is entirely separate from knowing Mr. Wilder to carry guns. When asked about Mr. Wilder's prior convictions specifically, Mrs. Wilder's

previous statements were not actually impeached. She again stated that she did not know of him to carry guns:

> *Prosecutor*: Ms. Wilder, you were with him [(Mr. Wilder)] in 2007, correct?
>
> *Witness*: Yes.
>
> *Prosecutor*: And you know that he was convicted of carrying a weapon back then, correct?
>
> *Witness*: Yes.
>
> *Prosecutor*: So you knew that he carried weapons, right?
>
> *Witness*: No. I didn't know but he was convicted.
>
> *Prosecutor*: Okay. You didn't know that he – you didn't see a weapon in your house?
>
> *Witness*: No.
>
> *Prosecutor*: Do you know the circumstances behind that [conviction]?
>
> *Witness*: No.

T2, 84-85.

And ultimately, like in *Denson*, "the trial court entirely failed to analyze the probative value" of Mr. Wilder's priors. *Denson*, slip op, 21; T2, 83. The Court of Appeals condoned the other acts evidence, citing the purpose provided by the prosecution—impeachment. This reliance was so great that the trial court did not give a jury instruction directing the jury to disregard the other acts evidence, or to consider it only as impeachment evidence of Mrs. Wilder. "[B]y failing to closely scrutinize the probative value of the proffered act, the lower courts permitted the admission of improper other acts evidence and thus erred under 404(b)." *Denson*, slip op, 21.

II. THE PROSECUTOR IMPROPERLY RAISED A COLLATERAL ISSUE TO ADMIT EVIDENCE OF THE DEFENDANT'S PRIOR FELONIES THROUGH IMPEACHMENT.

Issue Preservation and Standard of Review:

Trial counsel preserved this issue with a specific objection to the admission of the prior convictions and by moving for a mistrial. T2, 82, 93.

Prosecutorial misconduct is reviewed de novo to determine whether Mr. Wilder was denied a fair and impartial trial. *People v Ackerman*, 257 Mich App 434, 448-49; 669 NW2d 818 (2003).

A due process violation presents a constitutional question, which this Court reviews de novo. *People v Wilder*, 485 Mich 35, 40, 780 NW 2d 265 (2010).

Argument:

MRE 608(b) generally prohibits impeachment of a witness by extrinsic evidence regarding collateral, irrelevant, or immaterial matters. *People v Teague*, 411 Mich 562, 565; 309 NW2d 530 (1981). A "collateral" matter is "a question or issue not directly connected with the matter in dispute." *Black's Law Dictionary* (10th Ed.). In most cases, counsel is required to accept an answer given by a witness on cross-examination regarding a collateral matter. *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002).

A prosecutor may not elicit a denial as a "springboard for introducing substantive evidence under the guise of rebutting a denial." *People v Stanaway*, 446 Mich 643, 693; 521 NW2d 557 (1994). Put differently, eliciting a denial on a collateral issue "does not serve to inject an issue. Both the statement and the veracity of the witness are then collateral matters and the cross-examiner is bound by the response." *People v Bennett*, 393 Mich 445, 449; 224 NW2d 840

(1975). It is true that a party is "free to contradict the answers that he has elicited from his adversary or his adversary's witness on cross-examination regarding matters germane to the issue." *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995). However, for a matter to be "germane to the issue," it must "closely bear[] on defendant's guilt or innocence." *People v LeBlanc*, 465 Mich 575, 590; 640 NW2d 246 (2002) (citing *Vasher*, 449 Mich at 504.)

Notwithstanding these established principles, at Mr. Wilder's trial, the prosecutor used her cross-examination of Mrs. Wilder to introduce a collateral matter not relevant to the issues at trial. Whether Mrs. Wilder had *ever* known Mr. Wilder to carry weapons, particularly the two times years prior that Mr. Wilder had been convicted of unlawfully possessing a firearm, was collateral. T2, 84-85.

Notably, Mrs. Wilder did not testify as to whether Mr. Wilder possessed a gun while in the vacant lot when he was spotted by police officers. She had no direct knowledge of Mr. Wilder's whereabouts or belongings after he left their home on May 16, 2014; the prosecutor confirmed as much on cross-examination when she asked:

> *Prosecutor*: Now you were asked whether or not Mr. Wilder had a weapon on him that day?
>
> *Witness*: Yes
>
> *Prosecutor*: Okay. You don't know where he went? You didn't see where he went after he left your apartment on the eastside of Detroit, did you?
>
> *Witness*: No.

T2, 81.

Still, on cross-examination, the prosecutor inquired into irrelevant matters:

> *Prosecutor*: Do you know of Mr. Wilder to carry weapons?
>
> *Witness*: No.

> *Prosecutor*: Do you know of him to carry guns?
>
> *Witness*: No.
>
> *Prosecutor*: You've been with him for nine years and you don't know of him to carry guns?
>
> *Witness*: No.

Instead of accepting Mrs. Wilder's response, as required under Michigan jurisprudence, the prosecutor requested a side bar with the judge and was ultimately permitted to ask Mrs. Wilder about Mr. Wilder's 2007 and 2010 felony-firearm convictions. T2, 82-83.

In many ways, this case parallels *People v Stanaway*, 446 Mich 643; 521 NW2d 557 (1994). In *Stanaway*, defendant Stanway's nephew was called as part of the prosecution's case-in-chief. The nephew testified that defendant never made any statements to him about having "sex with a young woman." *Stanaway*, 446 Mich at 689. The prosecutor called a detective that interviewed the nephew to impeach that testimony; the detective testified that the nephew had told him that Mr. Stanaway had said he "screwed a young girl." *Id.* at 690.

This Court determined that this impeachment was improper because "the witness had no direct knowledge of any of alleged incidents" and this impeachment evidence actually went to the "central issue of the case." *Id.* at 692-693.

Mrs. Wilder's testimony covered Mr. Wilder's actions before he left the house on the day of his arrest, the clothing he wore, and his left-handedness. T2, 72, 75. Some of that testimony responded to police testimony. T1, 204, 207, 221. But ultimately, like in *Stanaway*, Mrs. Wilder's had no direct knowledge of what occurred in the vacant field where Mr. Wilder was arrested for possessing a firearm. In fact, she testified that she did not even know where Mr. Wilder went after he left their apartment that day. T2, 81.

Nevertheless, the prosecutor went on to ask broad questions about Mr. Wilder's gun possession over the entire duration of his relationship with Mrs. Wilder. Again, as in *Stanaway*, the prosecutor elicited a denial to introduce "substantive evidence under the guise of rebutting the denial…as a means of introducing [] highly prejudicial [evidence] that otherwise would have been admissible []." *Stanaway*, 446 Mich at 693.

One may argue that unlike in *Stanaway*, Mrs. Wilder's testimony, aside from that which segued into the admission of Mr. Wilder's priors, was relevant, and thus this case is more like *Kilbourn*. *People v Kilbourn*, 454 Mich 677, 683; 563 NW2d 669 (1997). But an examination of *Kilbourn* also shows that this cross-examination was improper.

In *Kilbourn*, defendant Kilbourn was convicted of assault with intent to do great bodily harm after he fired shots into a neighboring residence while two people were home. These shots fired occurred after those same neighbors had called the police on defendant, his father, and defendant's girlfriend, alleging a domestic disturbance. Defendant's father was called as a witness for the State and testified on direct examination that he never told police that his son was responsible for the shooting. He was impeached by the interviewing police officer who testified that defendant's father had implicated his son in the shooting. *Kilbourn*, 454 Mich at 681. This Court ruled that impeachment allowable because defendant's father "testified about a number of events that took place before the shooting, and indeed was a key actor in some of these events." *Id*. at 683-684.

But in *Kilbourn*, the state's witness had knowledge of defendant's possible motive. Defendant's father testified that after the police completed their inquiry following the domestic disturbance call from the neighbors, he phoned the neighbors asking them to call him first before they called the police, a phone call the neighbors described as "threatening." *Kilbourn*, 454 Mich

at 679-680. His credibility was directly "relevant to the case," and the extrinsic evidence—the content of the witness's statement to the police— was not used to impeach the witness on a collateral matter. While Mrs. Wilder's testimony may been more expansive in scope[1] than the impeached witness in *Stanaway*, she could not provide any direct testimony on the offense that led to Mr. Wilder's arrest. Although "[a] party is free to contradict the answers that he has elicited from his adversary or his adversary's witness on cross-examination on matters germane to the issue," that witness cannot be "contradicted regarding collateral, irrelevant, or immaterial matters." *People v Vasher*, 449 Mich 494, 504; 537 NW2d 168 (1995).

In *Vasher*, on cross-examination, the prosecutor asked defendant whether he had told Sherry Culkar that "it is a right or duty of a father, grandfather, uncle to instruct young females" and that "anything over twelve-years-old is too old for him." Mr. Vasher denied making both statements to Sherry Culkar. *Vasher*, 449 Mich at 498. On rebuttal, the prosecutor called Sherry Culkar to the stand who testified to the opposite, essentially that Mr.Vasher told her it was proper to "break the children." *Vasher*, 449 Mich at 503. This Court ruled that this was proper rebuttal evidence because it was "narrowly focused" and "refuted a specific statement made by the defendant on cross-examination." *Vasher*, 449 Mich at 504, 506. Further, this issue was not collateral because on direct examination Mr. Vasher had put his character at issue by stating that "he had not had sexual activity with the young girls because 'I love those children like they are my own. They call me grandpa, Paw-Paw Frank, because they love me.'" This Court determined

[1] In the present case, Mrs. Wilder's testimony calls into question Officer Fultz seeing "a black large cylinder object hanging out of [Mr. Wilder's] front right pocket" and watching Mr. Wilder "grab[] it with his right hand" because she testified that Mr. Wilder is left-handed. T1, 204, 207; T2, 75. She also testified that she did not know Mr. Wilder to own or wear corduroys yet Officer Shaw testified to seeing Mr. Wilder in "corduroy or pants similar I guess. I wouldn't narrow it down to corduroy but that's what they looked like to me." TT1, 221. However, as the prosecutor brought out in her initial appropriate cross-examination, Mr. Wilder had multiple residences, and Mrs. Wilder did not know "exactly what type of items" he had at those alternate residences. T2, 79.

that Mr. Vasher's beliefs "so closely bore on defendant's guilt or innocence, that it was not error for the prosecutor to have impeached defendant." *Id* at 504.

But in the present case, we have neither a defense witness introducing character evidence, nor an issue that so closely bears on Mr. Wilder's guilt or innocence that is admissible.

To the limited extent, if any, that this evidence reflected on Mrs. Wilder's credibility, it was improper for the prosecutor to introduce a collateral issue—whether Mr. Wilder has carried guns ever in the duration of their relationship—and then use extrinsic evidence—Mr. Wilder's prior convictions— to impeach her testimony. The prosecutor introduced Mr. Wilder's priors not to impeach Mrs. Wilder, but simply to parade Mr. Wilder's priors that were otherwise inadmissible.

III. THE COURT AND PROSECUTORIAL ERRORS WERE NOT HARMLESS.

"A preserved, non-constitutional error is presumed not to be a ground for reversal unless it affirmatively appears that, more probably than not, it was outcome determinative—i,e,, that it undermined the reliability of the verdict." *Denson*, slip op 22 (quoting *People v Douglas*, 496 Mich 557, 565-566; 852 NW2d 587 (2014) (quotation marks and citations omitted).

This court is to "examine the record as a whole and the actual prejudicial effect of the error on the factfinder in the case at hand." *People v Mateo*, 453 Mich 203, 206; 551 NW2d 891, 892 (1996) (citing *People v. Lee*, 434 Mich 59, 450 NW2d 883 (1990)). "Where the error asserted is the erroneous admission of evidence, the court engages in a comparative analysis of the likely effect of the error in light of the other evidence." *Id.*

The effect of the trial court and prosecutor's error was not harmless. Given the conflicting accounts of the same incident and the use the prosecutor made of the inadmissible evidence, the error was outcome determinative. Even with this unfairly prejudicial evidence admitted, the jury did not easily reach its decision to convict Mr. Wilder.

Defense witnesses (and the one prosecutor witness) and police officers gave conflicting accounts of the same incident. See *Denson*, slip op 23. After asking Mrs. Wilder if she ever knew her husband to carry guns, a question that evokes the "very propensity inference that MRE 404(b) forbids," the prosecutor was then permitted to individually address each prior conviction. Like in *Denson*, the prosecutor furthered this impermissible line of argument in closing. Unlike *Denson*, there were no photographs, no fingerprints, no expert testimony. Thus, this case is a "relatively straightforward one." *Denson*, slip op, 25.

The jury was required to weigh the credibility of two officers testifying to their observations of a field crowded with mostly males as they drove by on patrol against several

consistent defense witnesses. The prosecutor's own witness, Charmell Richardson, testified that she never gave her car keys to Mr. Wilder and that she did not see him with a weapon. T2, 22.

The effect of allowing in Mr. Wilder's priors was tremendous as the prosecutor used this otherwise inadmissible evidence to argue that Mrs. Wilder was lying to shield Mr. Wilder from conviction. She reinforced to the jury that Mr. Wilder "had some contact with weapons in the past." T2, 153. As our Supreme Court recognized in *People v Allen,* 429 Mich 558, 569 (1988), other-crimes evidence is likely to be misused by juries in at least three different ways:

> "First, that jurors may determine that although defendant's guilt in the case before them is in doubt, he is a bad man and should therefore be punished. Second, the character evidence may lead the jury to lower the burden of proof against the defendant, since, even if the guilty verdict is incorrect, no 'innocent' man will be forced to endure punishment. Third, the jury may determine that on the basis of his prior actions, the defendant has a propensity to commit crimes, and therefore he probably is guilty of the crime with which he is charged."

This error affected the jury's decisions on felony-firearm and felon-in-possession (the jury acquitted Mr. Wilder of carrying a concealed weapon) because the case came down to a credibility contest between defense and prosecution witnesses that made for intense, heated jury deliberations. T3, 4. Even with this highly prejudicial evidence, the jurors were still at odds, ultimately requiring the reading of an *Allen* instruction. "The prejudicial impact of all those past anti-social acts cannot be effectively removed from the jury's mind." *People v Robinson,* 417 Mich 661, 666; 340 NW2d 631 (1983); *see also, Denson,* slip op, 22 ("The risk is severe the jury will use the evidence precisely for the purpose it may not be considered, that is, as suggesting that the defendant is a bad person, a convicted criminal, and that if he did it before, he probably did it again.") (citations omitted). Any nagging doubts the jurors may have had were likely extinguished by the existence of two identical prior convictions. This inadmissible evidence

unfairly placed a weight on the scales in favor of the prosecution and made it impossible for Mr. Wilder to receive the fair trial he was entitled to. This error was not harmless.

In essence, the prosecutor's wrong was two-fold: the prosecutor unfairly attacked Mrs. Wilder's credibility (because the introduction of Mr. Wilder's priors did not actually impeach her) and simultaneously, the prosecutor unfairly attacked Mr. Wilder, as she introduced evidence that served only as evidence of Mr. Wilder's propensity for committing the offenses for which he stood trial. The court erred by admitting this evidence against Mr. Wilder and further erred by denying defense counsel's subsequent motion for mistrial. *People v Manning*, 434 Mich 1, 7; 450 NW2d 534 (1990) (An abuse of discretion "will be found only where denial of the motion deprived the defendant of a fair and impartial trial"). Put simply, it cannot be enough to cite "impeachment" and allow in prejudicial evidence that ultimately serves only as proof of criminal propensity. Due process requires a new trial for Mr. Wilder. Const 1963, art 1, § 17; US Const, Am XIV.

SUMMARY AND RELIEF

Mr. Wilder asks this Honorable Court to reverse his convictions and remand this case to the trial court for further proceedings.

Respectfully submitted,

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